VIRGINIA LAW REGISTER

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Our Supreme Court of Appeals at its last term rendered two very interesting and important decisions in regard to damages for the construction of roads by counties, and in one of which Section 58 of the State Constitution, which provides that "No private property shall be taken or damaged for public use without compensation," was passed upon. The word "damage," as is well understood, did not occur in any of our constitutions until the present one, which went into effect July 10th, 1902. In the case of the *County of Nelson* v. *Coleman,* the County condemned a right of way and had it staked out, but the contractor who built the road made a mistake and did not follow the stakes but constructed the road upon an entirely different piece of ground than that which was condemned and the County accepted the road as constructed. Mrs. Coleman claimed damages and the Supreme Court of Appeals held that she was entitled to the same and affirmed the decision of the lower court to that effect. Query: Was not the contractor liable to Mrs. Coleman as well as the County?

County Roads: Change of Grade: Damages: Suits against Counties.

The other case was the *County of Nelson* v. *Loving & Lea, etc.* Here there was no change in location but merely in grade, it being stated that the work complained of was confined to the original right of way for the road lawfully acquired and the work being done by the County as authorized by law. The court held that under Section 58 of the State Constitution, the party whose property was damaged by the change of grade was entitled to recover. It was claimed in both of these cases that in suing the County for such damage the action must be an action in tort, and that therefore under the ruling of the

court in *Fry* v. *Albemarle,* 86 Va. 195, no action of tort could lie against a County, which is a political subdivision of the State. The Court very properly holds that the rule in this case does not apply in a case of the character at bar; but unfortunately in the Coleman case, the court we think, uses language which might be liable to misconstruction and which in one or more journals of the State it has been stated has overruled Fry & Albemarle. That this is not a fact is clearly shown in the Loving & Lea case, and we are satisfied that the language used by the Court has been misconstrued by the papers. The Court says that "Where a tort is committed *which involves injury to personal property* the plaintiff may waive the tort and sue upon an implied contract to pay for the property which has been taken, *damaged,* or converted to the defendant's use" (italics ours). The ambiguity in the language arises from that portion of the opinion which says where a tort is committed which involves injury to personal property, an implied contract arises and the party injured may waive the tort and sue upon this implied contract * * * "to pay for the property which has been * * * damaged." Now Fry sued the County of Albemarle for damage done to her through one of the servants employed by the County of Albemarle, her horse being scared and her buggy turned over into the ditch and she seriously injured. Now, suppose the horse and buggy alone had been damaged: Would not there have been done a "tort which involved injury to personal property?" But does any one claim that the County could have been sued for injury to the horse and buggy under the same circumtances under which Mrs. Fry was injured? We humbly suggest that the language used in the Coleman case ought to be corrected to carry out what the Court unanimously decided in the Loving & Lea case. In other words, that it is only in case a contract can be implied where injury has been done that a County can be sued, i. e., taking the property and converting it to its own use and in such conversion damaging or taking it. Of course in such cases the party has the right to waive the tort and sue upon such implied contract. But a tort pure and simple, similar to that which occurred in the case of

Fry *v.* Albemarle, still, in our judgment, remains without remedy, whether justly or not.

In a very able opinion in the Loving & Leafcase, delivered by Judge Simms, the authorities are collated and it is made clear that by the sections quoted by necessary implication, the State has consented that the counties of the State, may be sued for injury to private property "damaged" by them "for public use." He says, "That the State has consented to the suing of counties on contracts" but not on causes of action "based on torts" and that suits or claims for personal injuries are barred.

It may be noticed that in both of these cases there were no "suits" as such. Claims were presented to the board of supervisors and disallowed by them, and then in pursuance of the statute in such cases made and provided appeals were taken to the circuit court. Section 843, etc., of the Code. As the Court very well says, it might under these circumstances be construed as immaterial whether the action was on contract or in tort. But as the question had been raised and fully argued, the Court thought it best to settle it and holds that even if the statute allowing the course pursued had not been in existence, either an action *in debitatus assumpsit* would lie on the quasi contract implied in law from the obligation imposed on the county by the Constitution to make just compensation in the premises, or an action of trespass on the case would lie. The Court alludes to one very important question which unfortunately was not sufficiently before the Court either in the pleadings or the argument so as to be capable of decision. That is, whether the county did not originally or prior to its action in changing the grade of the road aforesaid, so acquire the right of way for or the land occupied by the road that the damages claimed by the plaintiffs due to the subsequent change of grade was shown to have been in fact, or would be presumed to have been already paid by the county, or that all demand had been relinquished by the landowners. The Court, whilst alluding to this question, states that in the instant case it had to be taken as a concluded fact from the arguments in the case that the county did not so acquire the right of way for or the land occupied by the road, so as to bring about this result, and that

therefore the question remained an open one. It is certainly a very important one and it is to be regretted that in view of the very great impetus which is now being given to road construction and road repairing in this State this question should not have been decided. We have very little doubt that the Court will soon be compelled to pass upon it.

Inheritance Taxes: and Others.

Without meaning to be frivolous and with due consideration of the seriousness of any question relating to taxation—for death and taxes are the two things put down in the adage as the only certainties—we are constrained to believe that the old school boy song ought to be changed to read as follows: "Multiplication is vexation, division is as bad; the rule of three doth puzzle me and *taxation* drives me mad." Any one who has attempted to fill out an income tax return will certainly agree with this version. At the last term of our Supreme Court of Appeals three cases were decided—all turning upon our inheritance tax law. And at the present session of the Supreme Court of the United States, that Court handed down two decisions on the same day—one holding the New York income tax law unconstitutional and the other upholding the income tax law of Oklahoma, and previous to these decisions had sustained the validity of the inheritance tax law of Jersey. The question in these three cases last mentioned was to alleged discrimination against non-residents of that State. It was settled in the Oklahoma case that the State had the right to tax non-resident incomes as property within the State; but in that State no discrimination was made between residents and non-residents. In the New York case it was held that the law discriminated between incomes of residents and non-residents and that the law was therefore unconstitutional. And yet in the New Jersey case the Supreme Court of the United States upheld the inheritance tax on the Northern Securities estate of J. J. Hill—a non-resident—on the ground that equality of taxation was impracticable. And yet it is clear on reading that case and the

tax law of New Jersey that the inheritance tax law of that State is discriminatory against other states; for the tax is levied differently on residents and non-residents. On the latter the tax is levied on a ratio of the non-resident's property owned within and without New Jersey, and in fact taxes the succession to property without the State.

The unconstitutionality of the New York income tax law was based on the fact that it did not allow the same exemptions to non-residents as it did to residents. Surely this is not as bad as allowing a state, merely because a man owned property in it, to tax his entire estate wheresoever situated. We are trying to promote uniformity of laws between the states. Ought there not to be some uniformity in the taxing laws of the different jurisdictions?

In the Virginia cases, *Commonwealth* v. *Carter's Exor., Heth* v. *Commonwealth,* and *Withers, etc.* v. *Jones' Exor., etc.,* the constitutionality of the Virginia inheritance tax law of 1916 was assailed on two grounds. One—the familiar one, which the Court disposed of in short order—that it was void because it embraced more than one object, etc. Being an "Act to raise revenue" the Court held, as it has so often held, that its title was sufficient.

The more serious question was as to its unconstitutionality both from a federal and state standpoint in that it deprives the party taxed of his property without due process of law. Judge Prentis in a learned and illuminative opinion delivered for the majority of the Court—for Judge Simms dissented as to this—sustained the constitutionality of the act. Judge Simms's dissenting opinion is a very forceful and clear discussion of the law from his viewpoint and is worthy of careful perusal, but we cannot well see in the light of the numerous decisions and the reasoning of text writers upon them how the Court could have held otherwise than it did.

It is true that the party taxed had no day in court and no notice before the tax was fixed under the law as it stood in 1916 by the clerk, and his only remedy was by a bill in equity, Section 567 to 573 of the Code (Code 1919, Sec. 2385), not applying to inheritance taxes prior to June 21st, 1918. We may say

en passant that the Act of 1918, p. 416, provides for notice to the personal representative and heirs. But the Court holds that whilst no such notice was given under the Act of 1916, none was necessary, as the party had the right to apply to a Court of Equity for relief, and quoted numerous decisions of the Supreme Court of the United States to show that in matters of taxation, whenever the party taxed had an opportunity to be either heard pursuant to the provisions of some statute or by the holding of a court that he had a right in the trial of a suit to enjoin the collection of the tax, "due process" was afforded. Judge Simms in his dissenting opinion takes the ground that the action of the clerk finally fixed the liability of the taxpayer; for either the court or the clerk under that act determined the inheritance tax, and having strictly followed his statutory authority, no power resided in any Court of the State to disturb that action save upon the single ground of its invalidity because in conflict with the State or Federal Constitution. His argument upon this point is certainly very strong and logical. But we think that the power inherent in courts of equity to correct any errors either in the assessment or attempted collection of an illegal tax—a power long recognized in our State—afforded the taxpayer his day in court.

The important part of the decision turns upon the method of assessing the tax, and as this applies under the Act of 1918, we call special attention to it. The Court holds—contrary to the view of the State and to the opinion of many who attempted to construe the Act—that the assessment of the inheritance tax must not be made upon the entire estate of the decedent, but upon the specific estate or property which passes to the several beneficiaries, each of whom is entitled to an exemption of $15,000. (Under the 1918 act $10,000.) So that an estate of $100,000, to be divided amongst ten heirs, who belong to the class of grandfather, grandmother, father, mother, husband, wife, brother, sister or lineal descendant would pay no inheritance tax whatever. This of course is under the law of 1916. The law of 1918, however, is entirely different. It divides the persons entitled to the property, or to whom the property is devised into three classes. Class A is the hus-

band, wife, lineal ancestor or lineal descendant of a decedent. Class B is a brother, sister, nephew or niece of the decedent. The property passing to Class A is subject to a tax of one per centum of the fair market value of so much thereof as is in excess of ten thousand dollars and not in excess of fifty thousand dollars, and then graduated up as high as five per cent. The members of Class B are subject to a tax of two per centum of the fair market value of so much thereof as is in excess of four thousand dollars and not in excess of fifty thousand dollars, and then to a graduated tax up to ten per cent. But no tax is laid upon the members of Class A if the property passing to them does not exceed ten thousand dollars, and to Class B unless it exceeds four thousand dollars. And no bequest of any kind is taxable unless it exceeds the sum of one thousand dollars. The same exemption as in the Act of 1916, applies to educational and charitable bequests.

Contracts of Married Women Executed in a State Where They Are under Disability to Be Executed in a State Where No Disability Exists.

It is not often that a learned father of a learned son, both of whom are eminent legal writers, is quoted against that son. But such is the case in the recent cause of *Poole* v. *Perkins*, decided by our Supreme Court of Appeals in November. Professor John B Minor is called upon to refute Professor Raleigh C. Minor and the Court holds with the wine-bibbers in the Scripture that "the old is better."

Mr. and Mrs. Poole executed a negotiable note in Tennessee to be paid in Virginia. Mrs. Poole, being a married woman, in Tennessee her contracts were voidable and could not be enforced against her where a plea of coverture was set up. In Virginia she was and is under no such disability.

Mr. and Mrs. Poole after the execution of the note moved into Virginia and were sued upon the note which was signed, dated and delivered in Tennessee, their residence and domicile at the time of such signature, date and delivery.

They were sued upon the note in Virginia, where at the time of the suit they resided and were domiciled. Mr. Poole pled coverture, but the lower court held that the *lex domicilii* prevailed, and gave judgment against her. She appealed and our Supreme Court sustained the judgment of the lower court.

The Supreme Court very aptly says:

> "It would be idle to say that the question is free from difficulty. There are substantial reasons for a difference of legal opinion and the authorities upon the subject are by no means in harmony. The exact question has never been decided in this State. It would be impossible in an opinion of reasonable length to review all of the authorities bearing upon the subject and it would perhaps be unprofitable to do so, if such a thing were feasible."

The Court then *inter alia* proceeds to quote Professor Raleigh C. Minor in his excellent "Conflict of Laws," p. 410.

> "The only law that can operate to create a contract is the law of the place where the contract is entered into (*Lex Celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If by the law of that state no contract has been made, there is no contract. Hence, if by the *lex celebrationis* the parties are incapable of making a binding contract there is no contract upon which the law of any other state can operate. It is void *ab initio*."

But the Court quotes in opposition to this view of the law Professor Raleigh Minor's eminent and beloved father, the late Professor John B. Minor, 3rd Min. Inst. p. 143: "The law which is to govern in relation to the capacity of parties to enter into a contract is much disputed by the *continental* jurists of Europe. In general, however, they hold that the *law of the party's domicile* ought to govern (Stor. Confl. Laws, sec. 51 seq.). But the doctrine of common law is well established both in England and America that the capacity of parties to contract is with some few exceptions determined by the *lex loci contractus*—that is, the law of the place *with reference to which the contract is made*, which is usually the place *where it is made*, unless it is to be performed *in another place or country*, and then the law of that country."

The Court accepts this latter rule as applicable to the instant case and states the law to be that a disability of coverture arising from the law of a married woman's domicile does not follow her into other states and that if she goes into another state than that of her domicile and makes a contract valid by and to be performed in accordance with the laws of such state, she will be bound thereby, even though she would not have been competent to make the contract according to the laws of her own state. But the court states the converse of the proposition that if the married woman moves into a jurisdiction whose law imposes upon her a total incapacity to bind herself by any contract whatever, then perhaps for reasons of public policy the contract will not be enforced. We think the Court was eminently right when it said that the matter was one of a great deal of difficulty, but we are satisfied it reached the right conclusion when it held that a note executed in one state and made payable in another, whatever the laws of the state in which the note is payable, binds the parties.

Lawless Law Officers.

The time of our last General Assembly—which will have adjourned before this number of the REGISTER reaches its readers—has been taken up to an unreasonable degree in our opinion with fights against the Prohibition Department and in various laws attempting to change in some way the prohibition law—either to make it more rigorous or less so. There can be no question that the methods pursued by the zealous officers of the Prohibition Department, or other officers in the State attempting to enforce the prohibition laws have been marked by violations of law far graver and more serious to the well-being of the body politic than liquor ever was; for the liberties of the people as guaranteed under our Constitutions, State and Federal, are the most valuable of all of our possessions.

Probably one of the most outrageous cases in print is the case of *Johnson* v. *Commonwealth,* decided at the November term of our Supreme Court. Johnson, according to the evidence as set out in the opinion of the Court, was arrested and

brought back from Charlottesville, Virginia, to Staunton, in irons, upon evidence, which we know of course is correctly set out in the opinion of the Supreme Court, which ought not to have convicted—to use a slang phrase—a yellow dog of sheep stealing; but the serious part of the case was that it was developed that the prohibition officer who attempted the arrest was in the habit of signing affidavits in blank upon which warrants were to be issued and that in the instant case the warrants for the arrest of the defendant, charging him with speeding and resisting an officer, were issued upon a blank signed by such officer, not sworn to and left blank as to the offense. The officer testified that he even signed warrants in blank, meaning. the Court says, affidavits upon which warrants would have issued by the justice, and that his signature was attached to the warrant of arrest in the instant case, and that he "never swore out any warrant."

Our ancestors fought King George III, for less offenses against liberty than this action. We cannot forbear quoting the opinion of Judge Burks in this case. We think it ought to be framed in large letters and hung up in the office of the Prohibition Department, and a copy given to every officer, whether prohibition or otherwise, charged with issuing warrants, or whose duty it is to arrest people. Judge Burks, delivering the opinion of the Court says:

> "Of course no justice had a right to issue a warrant based on such papers which were in no sense affidavits. The conduct of the officer in signing such alleged affidavits, and of justices in issuing warrants thereon, was highly reprehensible and its repetition should not be permitted. While we recognize the fact that the officers charged with the enforcement of the prohibition law have frequently to deal with criminals of desperate character, and have to act quickly, they should at all times act legally. An officer seeking the enforcement of one law should not violate another in order to accomplish his purpose. Such conduct brings the administration of justice into disrepute and tends to the subversion of peace and good order. Apparently the prohibition statute furnishes the officers charged with its enforcement with all necessary power, but if it is defective in this respect, powers not granted should not be assumed, and application should be made to the legis-

lature for such powers as are needed to secure the proper enforcement of the law. Lawlessness cannot be subdued by lawlessness, but only by the prompt enforcement of the law by the State acting through its officers within the powers conferred upon them. The usurpation of power seldom, if ever, commands respect."

Proof of Documents and Handwriting.

The forward step taken by the courts of Virginia in Keister's Ex'rs *v.* Phillips Ex'r, Virginia Supreme Court of Appeals, and referred to in an editorial note in our May 1919 issue, has been enforced and supplemented in a recent Supreme Court case in Florida. This case, Boyd *v.* Gosser, 82 So. 758, Florida Supreme Court, July, 1919, marks a new step in the proof of documents which on account of its reasonableness and common sense will no doubt be followed by other courts of last resort. The opinion in this case says in brief that handwriting testimony given with enlarged illustrative photographs and detailed probative reasons must not be considered and perhaps dismissed as "merely opinion testimony." The forceful argument is that testimony of this character is not an appeal to the credulity of the trier of the fact but to his intelligence and reason. The point in brief is that if the testimony is convincing it ought to convince. The opinion definitely holds that testimony of this class, so illustrated and so enforced, is in fact "demonstrative evidence" and must be so considered. Thus is swept away at one stroke the contention that a "mere conflict" of evidence of this class destroys its value. Unfortunately there have been courts that adopted this lazy method of avoiding the necessity of applying reason and intelligence to the problem in hand. More and more the courts are coming to apply to litigation the methods of science and of every day business affairs.

This opinion says in part:

"The error in the conclusion arrived at upon the first hearing consisted in treating the testimony of the witness William J. Kinsley, the expert on handwriting, as merely opinion evidence.

It was something more than the mere opinion of the wit-

ness. It was a detailed statement of facts relating to the questioned signature of W. T. Boyd which was appended to the two documents; facts which were revealed by the use of mechanical instruments and scientifically established to the degree of demonstration.

So we have in this case upon the one side the law of mathematical probabilities, and upon the other the law of moral probabilities. 'Preponderance of the evidence' is a phrase which in its last analysis means probability of its truth. In a cause where there is conflicting moral evidence, the jury in the one case. the chancellor in the other. is required to decide accordingly as the weight of the evidence preponderates in favor of one proposition or the other. That is to say. having no personal knowledge of the transaction under investigation, they must by the application of common knowledge and experience decide which set of witnesses or line of evidence raises the greater probability of its consistency with truth.

"In the use of demonstrative evidence one relies upon the evidence of his own senses. It is therefore evidence of the highest rank. It is the ultimate test of truth. To this class belongs mathematics, because a proposition in mathematics may be established by the evidence of one's own senses. Moral evidence depends for its value upon veracity on the one hand and credulity upon the other; so in testing the truth of a witness' statement one must therefore draw upon his fund of common knowledge and experience of men and affairs, if, like a prudent man who "looketh well to his going," he would decide in accordance with that which seems most probable.

"In the case at bar we have the uncontradicted evidence of the expert on handwriting. The questioned signatures and photographs of them are before the court, as well as signatures admittedly genuine and photographs of them, some enlarged for convenience of comparison; and the means were at hand for measurements and other comparisons embracing the whole field of examination. So that the facts to which the expert witness testified concerning the characteristics and construction of the signatures are matters within the field of demonstrative evidence. These facts, being established by evidence of the first rank, are strongly presumptive of the further fact that the signatures in question are tracings or drawings by a hand other than the person whose signatures they purport to be, and this presumption is supported by the mathematical law of probabilities as well as the common expeience and knowledge of man."